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6 **UNITED STATES DISTRICT COURT**  
7 **SOUTHERN DISTRICT OF CALIFORNIA**  
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9 ABEL RIVERA,

10 Petitioner,

11 vs.

12 MONTGOMERY

Respondent.

CASE NO. 14cv700-WQH  
(BLM)

ORDER

13 HAYES, Judge:

14 The matter before the Court is the review of the Report and Recommendation  
15 (ECF No. 22) issued by United States Magistrate Judge Barbra L. Major,  
16 recommending that this Court grant Respondent's Motion to Dismiss Petitioner's  
17 Petition for Writ of Habeas Corpus as Untimely Filed (ECF No. 7).

18 **I. Background**

19 On October 9, 2014, the Magistrate Judge issued Report and  
20 Recommendation, recommending that the Court grant Respondent's Motion to Dismiss  
21 Petitioner's Petition for Writ of Habeas Corpus as Untimely Filed. (ECF No. 22).

22 The Magistrate Judge found that the limitation period for filing the federal habeas  
23 petition had run. The Magistrate Judge determined that: "The California Supreme  
24 Court denied Petitioner's petition for review on direct appeal on December 2, 2009.  
25 Petitioner did not file a petition for certiorari with the United States Supreme Court so  
26 the statute of limitations began to run ninety days later on March 2, 2010. *Bowen v.*  
27 *Roe*, 188 F.3d 1157, 1158-59 (9th Cir. 1999) (limitations period does not begin until  
28 after expiration of ninety-day period for seeking certiorari). Absent tolling, the

1 limitations period expired one year later on March 2, 2011. 28 U.S.C. § 2244(d). (ECF  
2 No. 22 at 8). The Magistrate Judge concluded that: “ Because Petitioner did not file his  
3 federal habeas petition until March 19, 2014, the petition is untimely unless sufficiently  
4 tolled.” *Id.*

5 The Magistrate Judge found that “the statute of limitations began to run on March  
6 2, 2010. It was tolled when Petitioner filed a habeas petition in the San Diego Superior  
7 Court on July 20, 2010. 140 days of the limitations period expired, leaving Petitioner  
8 with 225 days in which to timely file a federal petition. The statute remained tolled  
9 from July 20, 2010 ... until June 29, 2012, when the California Court of Appeal denied  
10 Petitioner's petition.” (ECF No. 22 at 10). The Magistrate Judge determined that  
11 “[Petitioner] is not entitled to statutory tolling for the August 23, 2012 petition filed by  
12 Mr. Scott and the November 30, 2012 petition filed by Petitioner.... Because the  
13 California Supreme Court found the petitions were not properly filed...” *Id.* at 13.

14 The Magistrate Judge concluded that: “When the statutory tolling ended on June  
15 29, 2012, Petitioner had 225 days remaining in which to file a timely federal habeas  
16 petition. Petitioner did not file his federal petition until 628 days later on March 19,  
17 2014. Thus, unless Petitioner can establish an entitlement to equitable tolling, the  
18 instant petition is time-barred.” *Id.*

19 The Magistrate Judge found that Petitioner is not entitled to equitable tolling.  
20 The Magistrate Judge determined that “Petitioner is not entitled to equitable tolling for  
21 the time the August 23, 2012 petition filed by Mr. Scott and the November 30, 2012  
22 petition filed by Petitioner were pending because neither petition was properly filed.”  
23 *Id.* at 15. “[T]he one-year AEDPA statute of limitations expired on February 9, 2013,”  
24 and, therefore, “the deadline for Petitioner to file his federal petition expired well  
25 before he was placed in the ASU on April 8, 2013 and August 27, 2013 so his time in  
26 the ASU and the time spent gathering his legal materials cannot justify equitable  
27 tolling.” *Id.* “Moreover, Petitioner has failed to establish that he is entitled to  
28 equitable tolling for the time that he spent in the ASU.” *Id.* “He was placed in the ASU

1 on August 27, 2014 because of his possible involvement and willful participation in a  
 2 riot involving ‘a large amount of Hispanic Inmates and 5 identified White Inmates.’”  
 3 *Id.* “Therefore, Petitioner’s time in the ASU was not ‘some extraordinary circumstance  
 4 [that] stood in his way,’ but the result of his own misconduct.” *Id.*

5 The Magistrate Judge concluded that: “...Petitioner has failed to establish that he  
 6 is entitled to equitable tolling. Thus, the instant petition is untimely and this Court  
 7 **RECOMMENDS** that Respondent’s motion to dismiss be **GRANTED.**” *Id.* at 16.

8 The Magistrate Judge found that Petitioner is not entitled to have his claim  
 9 considered due to actual innocence. The Magistrate Judge determined that “Plaintiff’s  
 10 arguments regarding the contents of the declaration ... do not constitute new evidence  
 11 and the declaration is not reliable evidence of an alleged constitutional error that  
 12 probably resulted in the conviction of an innocent person.” *Id.* at 17. The Magistrate  
 13 Judge concluded that “Accordingly, Petitioner is not entitled to have his untimely  
 14 petition hear on the merits under *Schulp.*” *Id.* at 18.

15 To date, neither party filed objections to the Report and Recommendation.

## 16 **II. Discussion**

17 The duties of the district court in connection with a report and recommendation  
 18 of a Magistrate Judge are set forth in Federal Rule of Civil Procedure 72(b) and 28  
 19 U.S.C. § 636(b)(1). When a party objects to a report and recommendation, “[a] judge  
 20 of the [district] court shall make a de novo determination of those portions of the  
 21 [Report and Recommendation] to which objection is made.” 28 U.S.C. § 636(b)(1).  
 22 When no objections are filed, the district court need not review the report and  
 23 recommendation de novo. *See Wang v. Masaitis*, 416 F.3d 992, 1000 n.13 (9th Cir.  
 24 2005); *U.S. v. Reyna-Tapia*, 328 F.3d 1114, 1121-22 (9th Cir. 2003). A district court  
 25 may “accept, reject, or modify, in whole or in part, the findings or recommendations  
 26 made by the magistrate judge.” Fed. R. Civ. P. 72(b); *see also* 28 U.S.C. § 636(b)(1).

27 Neither party objected to the Report and Recommendation, and the Court has  
 28 reviewed the Report and Recommendation in its entirety. The Court concludes that the

1 Magistrate Judge correctly found that Respondent's Motion to Dismiss Petitioner's  
2 Petition as Untimely Filed must be granted because Petitioner is time-barred. The Court  
3 adopts the Report and Recommendation in its entirety.

4 **III. Certificate of Appealability**


5 A certificate of appealability must be obtained by a petitioner in order to pursue  
6 an appeal from a final order in a section 2254 habeas corpus proceeding. *See* 28 U.S.C.  
7 § 2253(c)(1)(A); Fed R. App. P. 22(b). Pursuant to Rule 11 of the Federal Rules  
8 Governing Section 2254 Cases, "[t]he district court must issue or deny a certificate of  
9 appealability when it enters a final order adverse to the applicant."

10 A certificate of appealability should be issued only where the petition presents  
11 "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).  
12 It must appear that reasonable jurists could find the district court's assessment of the  
13 petitioner's constitutional claims debatable or wrong. *Slack v. McDaniel*, 529 U.S. 473,  
14 484 (2000). The Court finds that Petitioner has raised colorable, nonfrivolous  
15 arguments. The Court grants a certificate of appealability.

16 **IV. Conclusion**

17 IT IS HEREBY ORDERED that the Report and Recommendation (ECF No. 22)  
18 is ADOPTED in its entirety. The Petition for Writ of Habeas Corpus is DISMISSED.  
19 (ECF No. 1). A certificate of appealability is GRANTED.

20 DATED: December 16, 2014

21   
22 **WILLIAM Q. HAYES**  
23 United States District Judge  
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